IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 10-1-2007

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THE HONOURABLE MR.JUSTICE K. VENKATARAMAN

C.M.A.No.477 of 2001

M/s.Southern Roadways Ltd,
95, Peters Road,
Madras-14. .. Appellant/Petitioner

vs.

E.S.I.Corporation,
rep. by its Regional Director,
143, Sterling Road,
Madras-34. .. Respondent/ Respondent

Civil Miscellaneous Appeal filed under Section 82 of the Employees' State Insurance Act, 1948 against the order dated 8.12.2000 made in E.S.I.O.P.No.15 of 1994 on the file of the I Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.S.Ramasubramanian, S.C.,
For Mr.D.Meenakshi Sundaram

For Respondent : Mr.B.R.Ramesh Babu

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JUDGMENT

The above Civil Miscellaneous Appeal has been directed against the order of the learned I Additional Judge, City Civil Court, Chennai in ESIOP No.15 of 1994 dated 8.12.2000.

2. The appellant herein has filed ESIOP No.15/94 on the file of I Additional Judge, City Civil Court, Chennai under Section 75 of the Employees' State Insurance Act Act, 1948 (hereinafter referred to as "the said Act"). The said ESIOP has been filed by the appellant praying for a decree and judgment:--

(a) that the subsistence allowance paid to suspended employees are not wages as defined under Section 2(22) of the E.S.I. Act and further the trainees/apprentices are not employees within the meaning of the Act and claim for contribution as per letter dated 15.7.1993 is totally against law.

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(b) that the trainees would not come under the purview of the E.S.I. Act and therefore, the appellant is not liable to pay the amount as claimed in the notice.

(c) to declare that the claim is totally untenable.

(d) declaring that the appellant is not liable to pay any amount.

(e) directing the respondent to pay the cost of the petition.

3. The case put forth by the appellant is as follows. The appellant has its Branch office at No.95, Peters Road, Madras-14. The appellant is a big lorry transport operator and some of the employees, who have been suspended pending enquiry, are paid subsistence allowance. The respondent by their letter dated 3.12.1990 directed the appellant to pay contribution of Rs.33,780-30 from 1.12.1989 to 31.12.1990 for the subsistence allowance paid to the suspended employees and also Rs.20,047-40 for the wages paid to trainees for the above period, totalling Rs.67,897-64 covering interest at the rate of 6% upto 19.10.1989 and at 12% from 20.10.1989. The further case of the appellant is that the appellant has sent reply on 5.1.1991 stating that the claim of contribution with regard to subsistence allowance paid to the suspended employees and stipend paid to the persons designated as apprentices/trainees is not sustainable in law and on facts. While so, without giving any opportunity to the appellant, the respondent all of a sudden sent a letter dated 15.7.1993 asking the appellant to pay a sum of Rs.67,897-64. Hence, challenging the same, the said ESIOP has been filed by the appellant. The respondent resisted the said ESIOP on various grounds. The learned I Additional Judge, City Civil Court, Chennai by his order dated 8.12.2000 dismissed the said ESIOP and the present appeal has been filed against the said order.

4. At the time of admission, this Court has formulated the following substantial questions of law for consideration:-

(1) Whether the court below is right in refusing to grant relief to the appellant against the unlawful claim of the respondent-corporation for contribution under the under the Act in respect of apprentices after having found in favour of the appellant on the question of law?

(2) Whether the subsistence allowance paid as per the Standing Order for employees under suspension did not constitute wages under Section 2(22) of the E.S.I. Act?

(3) Whether the E.S.I. Court under Section 75 of the Act has got original jurisdiction to decide the question of law?

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5. I have heard Mr.S.Ramasubramanian, the learned senior counsel appearing for the appellant and Mr.B.R.Ramesh Babu, the learned counsel appearing for the respondent.

6. Mr.S.Ramasubramanian, the learned senior counsel appearing for the appellant, fairly conceded that as far as the claim of contribution in respect of substance allowance is concerned, he is not pressing the appeal, since subsistence allowance has been considered as wages by the Honourable Supreme Court. He has drawn my attention to the judgment reported in REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION v. M/S.POPULAR AUTOMOBILES (AIR 1997 S.C. 3956) wherein the Apex Court has held as follows:-

> "The High Court in the impugned judgments erred in taking the view that subsistence allowance was not a part of wages as defined by Section 2 Sub-section (22) of the Act. It must be held that such allowance forms part of wages as per sub-section (22) of Section 2 of the Act and consequently, on the said amount the employee will be liable to contribute under Section 39 by way of employee's contribution and equally the employer would be liable to contribute his share by way of employer's contribution on the amount of subsistence allowance paid to the suspended employee."

7. In view of the said fact, the appeal in respect of contribution towards subsistence allowance is rejected and the appeal is dismissed in so far as the contribution towards subsistence allowance.

8. The learned senior counsel appearing for the appellant further submitted that regarding the claim of contribution with regard to the trainees, the trainees/apprentices are not employees within the meaning of the Act. According to the learned senior counsel, they are getting only stipend or allowance and not wages. Further, the learned senior counsel has submitted that the appointment letter of apprentice would clearly indicate that they cannot be treated as employees during the period in issue. The learned senior counsel further submitted that even though a clear finding has been given by the learned I Additional Judge, City Civil Court, Chennai that the claim made by the respondent in respect of trainees is totally against law, the learned Trial Judge has dismissed the ESIOP on the sole ground that the appellant did not produce the letter dated 15.7.1993. In this connection, the learned senior counsel has drawn my attention to the impugned order wherein the following findings have been given by the learned Trial Judge:-

> "It is contended on the side of the petitioner that the respondent has also claimed contribution for the amounts given to trainees. In the light of the discussion made earlier, it is very clear that the claim made by the respondent in respect of trainees is totally against law.

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> From the close reading, the decision referred to above it is further made clear to the Court that an apprentice is not an employee within the meaning of Section 2(9) of the Employees State Insurance Act. Therefore, it is very clear that there is a considerable force in the argument advanced by the learned counsel for the petitioner."

9. Thus, according to the learned senior counsel for the appellant, when such findings have been given, the learned Trial Judge should not have rejected the claim of the appellant on the ground that the appellant has not produced the letter dated 15.7.1993 sent by the respondent. Further, the learned senior counsel appearing for the appellant has submitted that since the respondent did not dispute about the said letter, the rejection of the claim of the appellant on such ground is totally unjust. I am able to see force in the said contention. The learned Trial Judge, after finding that the claim made by the respondent in respect of trainees is totally against law, should not have rejected the claim of the appellant on the ground that the appellant herein failed to produce the letter sent by the respondent dated 15.7.1993, especially when the respondent did not dispute the letter dated 15.7.1993.

10. The learned senior counsel further relied on the judgment reported in 2001 (II) L.L.J. 793 (MADRAS) (MANAGEMENT OF JAWAHAR MILLS LTD v. REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE COPRORATION LTD) wherein this Court has held as follows:-

> "If the above said evidence on record is taken into consideration, in the light of the decision of the Apex Court cited above, the apprentice, who have undergone training in the petitioner-mill cannot be treated as employees under the meaning of Section 2(9) of the Act. If the apprentices cannot be treated as employees under the Act referred to above, the respondent-corporation is not justified in asking for payment of contribution towards the amount spent as stipend for the apprentices. In view of the said position, the impugned order passed by the Court below cannot be sustained."

11. Further, the learned senior counsel has cited the decision of the Apex Court reported in AIR 1976 S.C. 66 (THE EMPLOYEES' STATE INSURANCE CORPORATION v. THE TATA ENGINEERING & LOCOMOTIVE CO LTD) wherein it has been held as follows:-

> "From the terms of the agreement it is clear that apprentices are mere trainees for a particular period for a distinct purpose and the employer is not bound to employ them in their works after the period of training is over. During the apprenticeship they cannot be said to be employed in the work of the company or in connection with the work of the company. That would have been so if they

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were employed in a regular way by the company. On the other hand the purpose of the engagement under the particular scheme is only to offer training under certain terms and conditions. Besides, the apprentices are not given wages within the meaning of that term under the Act. If they were regular employees under the Act, they would have been entitled to additional remuneration such as daily allowance and other allowances which are available to the regular employees. We are, therefore, unable to hold that the apprentices is an employee within the meaning of Section 2(9) of the Act."

12. Thus, taking into consideration of the entire aspects of the matter, the fair and final order of the learned I Additional Judge, City Civil Court, Chennai dated 8.12.2000 made in ESIOP No.15 of 1994 is liable to be set aside in so far as the rejection of the appellant's claim regarding trainees/apprentices and the appeal is allowed in respect of the said claim. In view of the said finding, the appellant is entitled to get back the amount with proportionate interest from the respondent in so far as the contribution made by the appellant under the said head. The said amount has to be refunded by the respondent to the appellant within 12 weeks from this date. As held earlier, the appeal in respect of other claim, namely, contribution towards subsistence allowance is dismissed.

13. In the result, the Civil Miscellaneous Appeal is allowed in part as indicated above. There is no order as to costs.

dpp

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

To

1 The I Additional Judge,
City Civil Court, Chennai.

2. THE RECORD KEEPER, VR SECTION,
HIGH CORT MADRAS

+ ONE C.C to MR. D. MEENAKSHISUNDARAM ASSOCIATES SR.NO. 1888

GM(CO)
KSJ(25/01/2007)

Judgment in
C.M.A.No.477 of 2001

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